No. 189.

Sup. Ct. Dist. of Mackey v. Saffor
for Appellee.

Filed Jan. 14, 1898.

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JAMES H. McKENNEY
CLERK

IN THE Supreme Court of the United States.

OCTOBER TERM, 1897.

HENRY M. BAKER, *Appellant,*

vs.

HORACE S. CUMMINGS, *Appellee.*

No. 189

SUPPLEMENTAL BRIEF FOR THE APPELLEE.

This is an Equity Cause coming to this Court by appeal from the Court of Appeals of the District of Columbia. It had gone to that Court by appeal, *by the present appellant*, from the Supreme Court of the District.

Mr. Justice Hagner of the Supreme Court of the District, in an elaborate decision and opinion found the facts to be that the appellant had by concealment, fraud and misrepresentation, defrauded the appellee in the matter of the so-called purchase of a portion of the assets of the firm composed of the appellant and appellee, to an amount exceeding thirty thousand dollars. From that determination Baker appealed to the Court of Appeals and that Court found precisely the same facts.

In the brief filed by Appellant in this Court, no question is made as to the legal principles discussed and determined by the Supreme Court who rendered the decision in the first instance or that of the Court by whom it was considered on appeal.

The entire contention of the Appellant's counsel in this Court, is, that these two Courts erred as to the facts they found and that subject is discussed from pages 13 to 72 of their brief. The first 13 pages being devoted to an abstract of the pleadings and the assignment of errors, and the last page of the brief, p. 72, is devoted to the assignment of a reason by counsel as to why this Court should treat the case at bar as being an exception to the rule so firmly established and discussed in the original brief for the Appellee, pp. 7-9, " that where two Courts of Equity have already decided the facts in a case, the first Court as an original question and the second Court on appeal, the Supreme Court of the United States will not reverse that finding *except in the case of a most manifest error* It will be regarded as analogous to the finding of a jury in a case at law."

This Court is asked to ignore its numerous decisions to this effect and confirm by a decision which has been recently announced from this bench, Stewart *vs.* Hayden; and a reason having been given for this unusual request, it is proper that the reason should be discussed. As before stated that reason is to be found on p. 72 of the brief *contra*. It is as follows:

> " The character and honor of Mr. Baker have been by this suit assailed for the first time and so, we are justified in asking the careful consideration of this Court, of the history of this case, and the testimony which bears upon it."

Undoubtedly whether Baker's character had been attacked for the first or the hundredth time by this suit, this Court would carefully consider the history of the case—in fact "the history of the case" puts an end to the controversy, if this Court adheres to its established precedents.

It is confidently submitted, however, that the assertion of counsel that this suit is the *first* attack on the integrity of the appellant even if true, is not a reason why the salutary rule of this Court should be ignored.

The Court would stultify itself, if it added to the rule as now announced—and made its operation dependent upon the question as to whether the integrity of the appellant was assailed for the first time or not.

Under the rule as now understood, the facts will not be reconsidered in this Court "except in the case of the most manifest error." Will the Court add to this another qualification by adding, "unless appellant's counsel state in their brief that this suit is the first attack which has been made on the character and honor of the appellant?"

If that question is to be considered a pertinent one, something more than mere assertion of counsel should be required; and as to the present case, the Court would fall into grievous error should it assume the fact in that regard, to be as stated.

It is true that the character and honor of the appellant have been assailed by this suit and quite successfully, but it does not appear that it is the *first time* that his character and honor have

been assailed, for the Court to arrive at that conclusion must presume that the certifying counsel have had an unlimited acquaintance with the entire life and conduct of the appellant; if the modification of the rule contended for be made, it is safe to say that future litigants in this Court, when confronted with the difficulty of having the concurrent adverse decisions of the lower courts against them, will be able to find counsel who will state that the suit is the *first* attack on the integrity and honor of the client.

No particular immunity or privilege should be accorded to a wrong-doer even though it be his first deviation from the path of rectitude.

Besides it is entirely uncontradicted that by means of the unconscionable conduct of the appellant, he paid the appellee for transferring some of the assets of the firm to him, out of money in his hands entirely belonging to appellee, leaving a very comfortable sum still in his own hands and under which he has put into his pocket $32,772.14 (and probably a great deal more) which of right belonged to the appellee.

FRANKLIN H. MACKEY,
A. G. SAFFORD,
Of Counsel to Appellee.